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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-643

ROCKWELL INTERNATIONAL CORPORATION,

Petitioner,

vs.

DAVID L. KIRK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is any state statute of limitations applicable to a proceeding instituted by a private litigant according to the express provisions of and within the prescribed time limitations set forth in 42 U.S.C. §2000e (Title VII), or does Title VII itself set forth the only jurisdictional requirements for such a proceeding?

2. If the most analogous state statute of limitations is applicable to a Title VII claim by

a private litigant, is that period tolled during the pendency of the EEOC proceeding as a matter of (1) federal law or (2) state law?

STATUTE INVOLVED

This matter involves 42 U.S.C. §2000e (Title VII) and in particular 42 U.S.C. §2000e-5(e) [§706(e)] and (f)(1) [§706(f)(1)] which provide in pertinent part as follows:

> "(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, ...
>
> "(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision

> named in the charge. * * * * If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved. . . ."

STATEMENT OF THE CASE

Prior to filing the present suit, on or about April 27, 1971, respondent timely filed with the Equal Employment Opportunity Commission (EEOC) a CHARGE OF DISCRIMINATION as required by Title VII [see, 42 U.S.C. §2000e-5(e)], against petitioner. The charge of employment discrimination alleged that on February 15, 1971, respondent had been reduced from the position of Material Review Engineer to the lower position of Material Review Inspector because of his Caucasian race.

On or about May 6, 1971, respondent received notice from the EEOC that it had referred his charge to the California Fair Employment Practice Commission (FEPC) for its investigation, pursuant

to §706(b) of Title VII. On or about May 26, 1971, the FEPC declined to proceed in the matter, at which time the EEOC assumed jurisdiction.

Commencing on or about December 20, 1971, and continuing to July 26, 1976, respondent made numerous inquiries with the offices of the EEOC, his United States Congressman, United States Senator (Cranston), and the President of the United States, requesting each of them to determine the status of his charge with the EEOC and to expedite the proceedings. At no time during this period did respondent receive any written communication from the EEOC informing him of the status of his charge. What information he did receive concerning the status of his charge he received indirectly from his Congressman.

At no time during the pendency of the EEOC proceedings was respondent advised by his Congressman, Senator, President or any agent or employee of the EEOC or the FEPC that he could bring suit against petitioner, nor was he advised that the state statute of limitations might operate to bar his independent right to sue in federal court pursuant to Title VII if the EEOC was not successful in resolving the matter.

Finally, on or about August 17, 1976, respondent received his first written communication from the EEOC notifying him that it had not found reasonable cause to believe that his charge was true (hereinafter referred to as the "right to sue letter"). In addition, the letter notified him that (1) if he wanted to pursue his charge further, he had the right to sue petitioner in the United States

District Court in the area in which he lived within ninety days from the receipt of that "right to sue letter" and (2) failure to sue within that time period would cause his right to sue to be forfeited.

At all times prior to September, 1976, respondent was not represented by legal counsel in connection with his charge of discrimination against petitioner, or in the resulting proceedings before the EEOC and FEPC. Following respondent's receipt of the "right to sue letter," he retained his present counsel in September, 1976 to institute the instant action and pursue it on his behalf.

On November 11, 1976, less than 90 days after mailing and/or receipt of the "right to sue letter," respondent filed the within action in the United States District Court, Central District of California, to pursue his claim of discrimination against petitioner under the provisions of Title VII.

On December 13, 1976, petitioner filed with that District Court a Notice of Motion to Dismiss. The motion was heard on April 4, 1977, before the Honorable United States District Judge A. Andrew Hauk. The motion was granted by Judge Hauk on the grounds that the action was not timely filed within any applicable state statute of limitations.

On July 19, 1978, the Court of Appeals for the Ninth Circuit reversed the decision of the District Court. That opinion is officially reported at 578 F.2d 814 and a copy thereof is set forth in Appendix A to the Petition for Certiorari.

REASONS FOR DENYING THE WRIT

I. THE ISSUES RAISED IN THE PETITION HAVE ALREADY BEEN RESOLVED BY THIS COURT IN THE RECENT OCCIDENTAL LIFE INS. DECISION. [1]

A. THE OCCIDENTAL OPINION DID NOT DISTINGUISH BETWEEN THE IDENTITY OF A TITLE VII LITIGANT; THE SAME PRINCIPLES APPLY IRRESPECTIVE OF WHETHER THE PLAINTIFF IS THE EEOC OR THE COMPLAINANT.

In its petition (at pp. 18-19), petitioner acknowledges that in the recent decision in Occidental Life Ins. Co. of Cal. v. EEOC (1977) 432 U.S. 355, 97 S.Ct. 2447, this Court determined that the application of state statutes of limitation to actions brought under Title VII by the EEOC would be inconsistent with and frustrate the underlying policies of Title VII. Nevertheless, petitioner attempts to distinguish the Occidental holding from the present case on the sole ground that our case

[1] Occidental Life Ins. Co. of Cal. v. EEOC (1977) 432 U.S. 355, 97 S.Ct. 2447.

was brought by a private party instead of by the EEOC. In support of this distinction, petitioner relies exclusively on one isolated phrase in the Occidental opinion which has little or no bearing on this Court's decision and which is taken out of context. According to petitioner, the critical language in Occidental is the following sentence:

> "Unlike the typical litigant against whom a statute of limitations might appropriately run, the EEOC is required by law to refrain from commencing a civil action until it has discharged its administratige duties." Id. at 97 S.Ct. 2456.

An inherent premise in petitioner's argument is that respondent is "a typical litigant against whom a statute of limitations might appropriately run." However, a careful reading of the entire Occidental opinion clearly reflects that a private litigant suing after the EEOC has completed its investigation is no more a typical litigant than is the EEOC when it sues following such an investigation.

The Occidental decision distinguishes between defendants in "Title VII civil actions" and defendants in a "private action" in the context of illustrating that the former class is not prejudiced by inflexible time limitations on instituting suit. Id. at 97 S.Ct. 2458. This distinction was expressed as follows:

> "Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the

possibility of an enforcement suit within 10 days after a charge has been filed." Ibid. (Emphasis added.)

When this Court is discussing the "typical litigant," it is referring to one who is not a party to a Title VII proceeding. This is true irrespective of whether the party is a plaintiff or defendant. Thus, when this Court related that the EEOC was not a typical litigant against whom a statute of limitation might appropriately run, it was obviously referring to any Title VII plaintiff who refrained from filing suit until the EEOC discharged its administrative duties.

Moreover, the Occidental opinion discloses that the same federal policies which compel the conclusion that employing a state statute of limitations would be contrary to the purposes of Title VII are applicable irrespective of whether the ultimate party commencing litigation following an EEOC investigation is the EEOC or a private litigant. In discussing the particular underlying policies of the federal statute, this Court, in Occidental (at 97 S. Ct. 2455-56), emphasized that when Title VII was first enacted, Congress selected cooperation and voluntary compliance as a preferred means of achieving the stated goal of the legislation. According to this Court's opinion, Congress originally created the EEOC to act as the administrative agency to achieve voluntary compliance with Title VII prior to the time an aggrieved party would be permitted to file a lawsuit. The decision noted that, although the subsequent amendment to Title VII in 1972 empowered the

EEOC to institute civil actions, Congress preserved the administrative functions described above. This Court then described its resulting conclusion regarding the applicability of state statutes of limitation to Title VII actions as follows (at 97 S. Ct. 2456):

> "In view of the federal policy requiring employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in a federal court, it is hardly appropriate to rely on the 'State's wisdom in setting a limit . . . on the prosecution. . . .' Johnson v. Railway Express Agency, supra, 421 U.S., at 464, 95 S.Ct., at 1722. For the 'State's wisdom' in establishing a general limitation period could not have taken into account the decision of Congress to delay judicial action while the EEOC performs its administrative responsibilities. (Citations omitted.) Indeed, the one-year statute of limitations applied by the District Court in this case could under some circumstances directly conflict with the timetable for administrative action expressly established in the 1972 Act." (Footnote omitted.)

These same policy considerations are present irrespective of whether the ultimate litigant is the EEOC or a private party. If either a private litigant or the EEOC was to initiate a lawsuit prior to the completion by the EEOC of its administrative functions because of the operation of a state statute

of limitations, the federal policy requiring investigation and administrative resolution by the EEOC prior to suit will be completely frustrated. In other words, a claimant who is pressured into filing a suit before the EEOC has com pleted its administrative duties to avoid the expiration of a state limitation period will just as readily frustrate the congressional purposes of Title VII as would an action by the EEOC under those conditions.

B. CONGRESS DID NOT INTEND TO REMOVE THE RIGHT OF A PATIENT EMPLOYEE TO SUE AFTER THE EEOC HAS CONCLUDED ITS INVESTIGATION WHEN IT AFFORDED AN IMPATIENT EMPLOYEE THE RIGHT TO DEMAND A RIGHT TO SUE LETTER FROM THE EEOC AFTER 180 DAYS.

The contrary position advanced by petitioner that state statutes of limitation apply to Title VII actions by private litigants would totally negate the meaning and impact of §706(f)(1) of Title VII. That provision empowers a private litigant to commence litigation within 90 days after receipt of a right to sue letter from the EEOC following its dismissal of the investigation. According to petitioner, a claimant who filed his charge with the EEOC and elected to follow the alternative preferred by Congress of having the charge reviewed by the EEOC would be precluded from

a trial on the merits if the EEOC was unsuccessful in resolving the charge and the state statute of limitation had expired.

Petitioner's position would produce a result that is directly contrary to the intent of Congress in extending to private claimants an option to demand a right to sue letter 180 days after the filing of the charge although the EEOC has not concluded its investigation. According to the Occidental opinion, the option to demand a right to sue letter was extended to the impatient claimant as an alternative to waiting until the EEOC had completed its activities; the demand of a right to sue letter was not intended to be the required course of action. In that regard, this Court quoted the following language from the 1972 Congressional Record (118 Cong. Rec. 7168, 7565):

> "'The retention of the private right of action, as amended, . . . is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission . . . does not act with due diligence and speed. Accordingly, the provisions . . . allow the person aggrieved to elect to pursue his his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.
>
> "'It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through

the offices of the EEOC. . . . However, as the individual's right to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.'" (Footnote omitted.) (Emphasis added.) Id. at 97 S.Ct. 2454.

This quotation clearly reflects that Congress intended to preserve the right of a private litigant to sue after the EEOC has dismissed his charge after its investigation. To impose an obligation upon the claimant to sue before the EEOC has concluded its investigation would contravene that expressed intent as well as the congressional desire that the exercise of the option to sue prematurely would be the exception and not the rule.

The logical extension of petitioner's argument would require a conclusion that Congress, when it afforded the option to the impatient grievant to refrain from waiting until the expiration of the EEOC proceedings, took away the right of a patient grievant to cause his claim to be resolved finally by a judicial tribunal. If petitioner's version is correct, an employee who elected to follow the congressional preference of permitting the EEOC to consider the matter fully would be finally bound by any unsatisfactory EEOC determination. This would be true even though the action by the EEOC was not the product of a full and fair evidentiary proceeding.

Yet, under those same circumstances, the employer of the patient grievant would not be so bound and, in fact, could force the matter into the judicial forum simply by inaction. Such a disparate treatment is totally contrary to the expressed desire of the legislators that the primary purpose of the 1972 amendments was to afford fairness to all affected parties. This goal was acknowledged in the very quotations set forth by petitioner at pages 16-17 of the petition.

Dilatory tactics by the employer are encouraged by the impossible choice imposed upon the employee by virtue of petitioner's position (i.e., the choice either (1) to abandon hopes of resolution by or assistance from the EEOC and commence suit at great personal expense, or (2) to abandon the right to bring suit later if the EEOC cannot and does not resolve the matter).

The longer the employer prolonged the administrative investigation by the EEOC, the sooner the claimant would be forced to make this unpleasant election. This action would increase the possibility of causing the potential defendant to face only an impecunious private litigant, instead of an arm of the United States government, the EEOC. As the committee report which accompanied the Senate version of the 1972 amendments to Title VII explained:

> "This disparity between complainants and respondents in Title VII litigation has been recognized by the courts which have characterized the disputes as 'modern day David and Goliath

confrontation[s].' In such situations, the public has an overriding interest in protecting the individual from the denial of those rights which Congress has specifically provided. (Footnote omitted.)" S. Rep. No. 92-415, 92 D. Congress, 1st Sess., at 17 (1971).

Furthermore, federal courts have long recognized that the administrative procedures enunciated in Title VII are designed so that an individual with a claim of employment discrimination need not seek the advice of an attorney. See, e.g., Mahroom v. Hook (9th Cir. 1977) 563 F.2d 1369, Davis v. Valley Distributing Co. (9th Cir. 1975) 522 F.2d 827, 831. The application of the position asserted by petitioner would require the employee to obtain legal counsel at the earliest possible date so that the individual can make the impossible decision as intelligently as possible. In fact, the employee would need legal assistance at the initial administrative stages to provide advice as to the duration of the applicable state statutes of limitations, and any related matters such as tolling, etc. In such an event, there would be total frustration of the broad structure and purpose of Title VII, as established by Congress, which "relies upon laymen operating without legal assistance, to initiate both administrative complaints and lawsuits." Mahroom v. Hook, supra.

As we will illustrate in a subsequent argument (infra, at pp. 23-25), a potential defendant will not be treated unfairly by this Court's extension of the Occidental holding to a Title VII action that is

maintained by a private litigant. We will show that, in Occidental, this Court directly faced this issue and specifically stated that where a defendant is significantly handicapped by an inordinate EEOC delay, or is otherwise prejudiced by a grievant's unexcused conduct, the trial court may restrict or even deny back pay relief.

In other words, a federal court has the power to afford protection to a defendant who is unfairly prejudiced. However, a private litigant who has suffered because of an EEOC delay, for example, could not be rescued by the federal court if the delay caused him/her to refrain from filing suit until after any applicable period of limitations has expired. Clearly, the need for fairness deeply appreciated by the senators upon whose statements petitioner relies dictates that Occidental be extended to all Title VII actions, irrespective of the identity of the plaintiff.

Finally, if the position advocated by petitioner were implemented, there would be absolute no advantage for a claimant to place his fate in the hands of the EEOC where the best he could do, absent a compromise, would be to have his judicial remedy pursued by the EEOC instead of himself. If the EEOC were not so inclined, the claimant would be barred forever from pursuing his own judicial remedies. Thus, the only logical course of action for a claimant to pursue would be to exercise his option to demand a right to sue letter so as to avoid forfeiture of any right to utlize the judicial process and secure a full and fair adjudication on the merits.

Such a result would be directly contrary to the congressional expression which this Court described as the "final and conclusive confirmation of the meaning of Section 706(f)(1)":

> "It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC." Id., at 97 S. Ct. 2454.

The same policy considerations relied upon by the Supreme Court in Occidental in support of the conclusion that state periods of limitation should not be used to frustrate the expressed purpose of Congress in encouraging full and complete action by the EEOC are equally applicable to our situation. There is absolutely no logical basis for distinguishing between the identify if the party filing suit (i.e., EEOC or grievant) where the grievant has elected to refrain from suing prematurely in order to permit the EEOC to investigate the matter fully and make all efforts to attempt to resolve the problem administratively. In either case, the same federal policies will be advanced if state statutes of limitations are not applied.

C. OCCIDENTAL HAS ALREADY ESTABLISHED THAT TITLE VII CONTAINS ITS OWN PERIOD OF LIMITATIONS; HENCE AN OVERALL LIMITATIONS PERIOD IS NOT REQUIRED.

Petitioner argues (at p. 8) that the time limitations set forth in Title VII do not establish an overall period of limitations. Assuming, arguendo, that petitioner's analysis is accurate, we fail to perceive the necessity for such an argument. In other words, petitioner has failed to establish that it is essential that every right to sue be governed by "an overall period of limitations."

To the contrary, the most ready response to petitioner's argument is that in Occidental this Court has just held that the EEOC may bring an action under Title VII without being bound by any "overall period of limitations."

The Occidental decision acknowledges (at 97 S. Ct. 2457) that Congress did reflect concern for the need of certain time limitations in the fair operation of the Act. The opinion emphasized, however, that this concern was directed exclusively to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator. This Court illustrated (at 97 S. Ct. 2457) that the congressional intent was clear that "the statue of limitations problem was perceived in terms of these provisions rather than in terms of a later

limitation" on the power to sue. As a result, the opinion concluded:

> "The fact that the only statute of limitations discussions in Congress were directed to the period preceding the filing of an initial charge is wholly consistent with the Act's overall enforcement structure -- a sequential series of steps beginning with the filing of a charge with the EEOC. Within this procedural framework, the benchmark, for purposes of a statute of limitations, is not the last phase of the multistage scheme, but the commencement of the proceeding before the administrative body." Id., at 97 S.Ct. 2457-58.

Again, the same concern is applicable irrespective of whether the ultimate civil action after the EEOC has concluded its investigation is to be filed by the EEOC or the grievant. These periods of limitation relating to the commencement of the proceeding before the EEOC apply equally to either situation. Failure to comply bars suit by either party.

In support of its position, petitioner relies upon certain language in the case of Johnson v. Railway Express Agency, Inc. (1975) 421 U.S. 454, 95 S.Ct. 1716. However, a careful reading of Johnson reflects that there was no mention of the phrase "overall period of limitations," let alone any determination that, absent its presence in a federal law, a state statute of limitations must

always apply. To the contrary, Johnson merely held that, with respect to an action brought under 42 U.S.C. §1981, a state statute of limitations would be applied because (1) that Act does not contain any period of limitations whatsoever, and (2) there is no underlying federal policy that would be contravened by the application of a state statute of limitations. This Court emphasized that an action brought under §1981 is completely separate and independent from a Title VII action. It also related that there was no legislative policy in favor of encouraging investigation of complaints of §1981 violations by the EEOC and resulting attempts at conciliation, as follows:

> "We are satisfied, also, that Congress did not expect that a §1981 court action usually would be resorted to only upon completion of Title VII procedures and the Commission's effect to obtain voluntary compliance." Id., at 421 U.S. 461, 95 S.Ct. 1720.

Johnson indicated that, because these two actions were separate and apart, it was not unfair or unreasonable for an employee who elects to present his case for full consideration by the EEOC pursuant to Title VII to accept the attendant risk that any time delays would result in a forfeiture of his §1981 action. However, to carry that conclusion one step further to deprive him of his cause of action under Title VII is a matter totally removed from the consideration set forth in Johnson and directly contrary to the holding in Occidental.

II THE ASSERTED EVILS RESULTING FROM THE DECISION OF THE COURT OF APPEALS EITHER (1) MUST BE PRESENTED TO CONGRESS FOR REMEDY OR (2) HAVE ALREADY BEEN ADDRESSED BY THE OCCIDENTAL OPINION.

In its petition (at pp. 5-8), petitioner devotes much effort attempting to illustrate the inefficiency of the EEOC and the resulting backlog of cases. Petitioner argues that, unless this Court imposes an overall period of limitations restricting the time within which a private litigant can seek judicial relief, Federal District Courts will be inundated with "stale" claims. Petitioner also recites policy considerations in furtherance of sound employer-employee relations (at pp. 12-13) which would be thwarted if this Court did not impose a specific overall period of limitations. Finally, the petition contends (at pp. 13-18) that, if the decision of the Ninth Circuit Court of Appeals is permitted to stand, all parties will be denied a fair trial because of the loss of evidence through witnesses becoming unavailable and memories dimming, etc.

A. PETITIONER'S CONCERNS MUST BE ADDRESSED TO CONGRESS

Our initial response is that these matters are appropriately the subject of legislative

consideration, and are not properly addressed to this Court. The appropriate means for avoiding these evils or promoting the policies sought to be advanced by petitioner would be to secure through Congress an amendment to Title VII inserting a prescribed period of limitations to govern those situations. However, petitioner seeks to accomplish those objectives through a decision of this Court which has the effect of denying to respondent the opportunity to pursue his claim of discrimination, even though respondent proceeded with extreme diligence throughout this entire proceeding. Such a procedure would be totally foreign to well established principles of jurisprudence as enunciated repeatedly by the opinions of this Court. See, e.g., Blount v. Rizzi (1971) 400 U.S. 410, 419, 91 S.Ct. 423, 429.

B. THE OCCIDENTAL OPINION HAS ALREADY CONSIDERED AND DISPOSED OF THE CONCERNS EXPRESSED BY PETITIONER.

Secondly, petitioner's concerns were addressed by this Court in the Occidental opinion. As we noted earlier, the Occidental decision emphasizes that the strong preference of Congress was to secure administrative resoltuion of claims. The opinion also reflects that the Legislature demonstrated an awareness of the time lags involved in the EEOC proceedings but nevertheless substantially increased the workload of the agency by the 1972 amendments. Occidental Life Ins. Co. of Cal. v. EEOC, supra,

97 S. Ct. 2457. This Court concluded that it would not be reasonable to assume that, with that state of mind, Congress would have granted to the EEOC additional enforcement responsibilities while limiting the time within which federal lawsuits could be commenced by claimants who were dissatisfied with EEOC action. Ibid.

In other words, in Occidental, this Court determined that it would be totally inconsistent for Congress, on the one hand, to talk about the strong desire to secure administrative disposition of claims and avoid judicial proceedings and yet, on the other hand, to force claimants to go to court by increasing the workload of the EEOC to such an extent that, as a practical matter, it could not resolve the claims within the 180 day period. This Court reconciled those considerations by the only logical conclusion: i.e., the option to demand a right to sue letter after 180 days and, thereafter, to commence suit within 90 days of receipt of that letter, was simply an additional available course of action, not the only opportunity to sue.

In fact, as we noted in our previous argument (at p. 16), it is petitioner's position that a requirement that an election to sue must be made after 180 days will serve to congest federal courts. Circuit Judge Hufstedler, in her concurring opinion, and particularly in footnote 9 (at pp. 24-25 of Appendix A to the Petition), illustrates that petitioner's arguments will contravene the recognized goal of administrative resolution of claims by the EEOC.

Petitioner's other concerns regarding the potential deprivation of a fair trial to the employer

were also specifically addressed in Occidental, as follows (at 97 S. Ct. 2458):

> "The absence of inflexible time limitations on the brining of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims. Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.
>
> "Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that the charged party be promptly notified when a determination of reasonable cause has been made, (footnote and citations omitted), and when the EEOC has terminated its efforts to conciliate a dispute, (citation omitted).

"It is, of course, possible that despite these procedural protections a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief. This Court has said that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny backpay relief." (Citation omitted) (Emphasis added).

Naturally, the same protections afforded to Title VII defendants in actions by the EEOC are likewise present when the claimant sues. In fact, greater protection is provided the potential defendant in cases where the EEOC dismisses the charge and places the decision to commence suit in the hands of the private complainant. Once the complainant is notified that the EEOC has dismissed the charge, the suit must be brought within 90 days. On the other hand, if the EEOC elects to bring suit, Title VII imposes no time restrictions. If this Court can determine that the open-ended situation where the EEOC is the plaintiff is consistent with underlying federal policies, certainly the former state of affairs which limits to 90 days the right of a private litigant to sue is tolerable. In other words, if congressional intent permits the circumstance where the duration of both the EEOC investigation and its right

thereafter to sue are unlimited, such intent necessarily allows the situation where only the investigation is without any time restrictions.

III ANY APPLICABLE STATUTE LIMITATIONS WAS TOLLED DURING THE PENDENCY OF THE PROCEEDINGS BEFORE THE EEOC.

A. FEDERAL POLICY CONSIDERATIONS DO NOT PRECLUDE THE TOLLING OF ANY APPLICABLE PERIOD OF LIMITATIONS WHILE THE EEOC PROCEEDINGS WERE PENDING.

Apparently, petitioner has abandoned the argument strongly asserted before the Ninth Circuit Court of Appeals that, under the principles of both federal and California law, any applicable state statute of limitations was not tolled while the EEOC possessed jurisdiction over respondent's claim. Instead, petitioner now argues that overall considerations of federal policy should operate to preclude the operation of the applicable "tolling principles." The basis for petitioner's contention is that, unless such policy considerations are applied, there would be no "overall period of limitations," as there would be no restriction on the length of time which the EEOC could maintain jurisdiction.

In response, we must again emphasize that these asserted policy factors were considered by this Court in Occidental. Nevertheless, the court determined that it would permit the institution of a Title VII suit in federal court following the completion of the EEOC proceedings, irrespective of the fact that there were no prohibitions limiting the duration of those proceedings and the litigation was commenced well after the expiration of any potential state statute of limitations. We have illustrated in our earlier arguments, at great length, that the identical rationale and overriding policy considerations relied upon by this Court are equally applicable to our situations, where the only difference is the identity of the plaintiff. Accordingly, those federal policy considerations asserted by petitioner are outweighed by those more significant countervailing factors relied upon by this Court in Occidental. Hence, they cannot operate to remove the application of any "tolling principles" that would preserve the sanctity of the EEOC proceedings and accomplish the desired goal of encouraging administrative resolution of disputes.

B. PRINCIPLES OF FEDERAL LAW REQUIRE THAT ANY APPLICABLE STATUTE OF LIMITATIONS BE TOLLED WHILE THE EEOC HAS JURISDICTION.

Petitioner again seeks support from this Court's decision in Johnson v. Railway Express

Agency, supra. In Johnson, this Court related that federal law and policy did not require that a §1981 action be tolled during the pendency of EEOC proceedings. However, that holding was not intended to extend, and should not be extended, to any and all federal civil rights suits.

In Johnson, this Court distinguished two cases cited in support of the proposition that any state statute of limitations governing the time within which a §1981 action shall be brought must be tolled during the pendency of EEOC proceedings: [American Pipe & Construction Co. v. Utah (1974) 414 U.S. 538, 94 S.Ct. 756, and Burnett v. New York Central R. Co. (1965) 380 U.S. 424, 85 S.Ct. 1050.] In that connection, the court made the following pronouncement (at 411 U.S. 467, 95 S.Ct. 1723-24):

> "Finally, and perhaps most importantly, the tolling effect given to the timely prior filings in American Pipe and in Burnett depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted. This factor was more than a mere abstract or theoretical consideration beccause the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect.14/"

Footnote 14 to the Johnson opinion (at 421 U.S. 467, 95 S.Ct. 1724), reflects that at that time this Court was unsure whether a Title VII charge before the EEOC afforded the employer

with the protection against loss of evidence, the disappearance and fading memories of witnesses and any unfair surprise that could result from a sudden revival of a claim that long has been allowed to slumber. The opinion indicated:

> "Only where there is complete identity of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period." Ibid.

In our case, the prior filing by respondent with the EEOC, pursuant to Title VII, involves exactly the identical cause of action being asserted in this Title VII suit. Moreover, as we noted in an earlier argument, Occidental resolved any uncertainty that might have existed when Johnson was decided regarding the protection afforded a party against whom a Title VII charge with the EEOC has been filed. In that regard, this Court stressed that such a prior filing with the EEOC necessarily operated to avoid any evil against which the statute of limitations was designed to protect, as follows (at 79 S.Ct. 2458):

> "The absence of inflexible time limitations on the bringing of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims.

> Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.
>
> "Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that the charged party be promptly notified when a determination of reasonable cause has been made, (footnote omitted and citations omitted), and when the EEOC has terminated its efforts to conciliate a dispute (citation omitted)."

Accordingly, this Court must rreject any contention that Johnson holds that any applicable state statute of limitations shall not be tolled during the pendency of the EEOC proceedings. To the contrary, if a state period of limitations were, for some reason, held to apply to our proceeding, an application of principles of federal law requires that any such statute of limitations be tolled during the pendency of the EEOC proceedings. American Pipe & Construction Co. v. Utah, supra; Burnett v. New York Central R. Co., supra.

The Circuit Courts of Appeal have tolled state statutes of limitations in claims under Title VII for back pay. Prior to 1972, Title VII contained no limitations period respecting an award of back pay. Federal courts therefore borrowed the most applicable state statute of limitations. However, the courts calculated the limitations period for back pay from the date of the filing of a claim with the EEOC rather than from the date of the judicial complaint. The rationale behind this course was that the filing of the EEOC claim tolled the limitations period and that it remained tolled "during such time as the processes of agency reconciliation are at work and until notification to the complainant that voluntary compliance cannot be obtained." Franks v. Bowman Transportation Co. (5th Cir. 1974) 495 F.2d 398, 405, cert. denied, 419 U.S. 1050 (1974); see also, Johnson v. Goodyear Tire & Rubber Co. (5th Cir. 1974) 491 F.2d 1364, 1378; United States v. Georgia Power Co. (5th Cir. 1973) 474 F.2d 906, 925.

Title VII limitations themselves have been tolled by the Circuit Courts of Appeal on the ground that since the statute requires recourse to the EEOC prior to suit, victims of discrimination should hot be penalized because of EEOC delays and errors over which they have no control. See, Choate v. Caterpiller Tractor Company (7th Cir. 1968) 402 F.2d 357; and Gates v. Georgia Pacific Corp. (9th Cir. 1974) 492 F.2d 292, 295. The time limitations of Title VII have also been tolled where delay is attributable to non-EEOC parts of the federal government. See, Harris v. Wallgreens Distribution Center (6th Cir. 1972)

456 F.2d 588, 592; Harris v. National TCO. (7th Cir. 1971) 454 F.2d 307, 312.

C. IF A STATE STATUTE OF LIMITATIONS IS TO BE BORROWED, THAT STATE'S LAW AS TO THE TOLLING OF THE STATUTE MUST ALSO BE APPLIED.

In Johnson, this Court noted (at 421 U.S. 464-65, 95 S.Ct. 1721-22) that, in determining the circumstances under which any applicable state period of limitations is tolled or suspended, the law of the state in question on this issue should be followed absent conflicting federal policy considerations. In that regard, the opinion stated (at 421 U.S. 464-65, 95 S.Ct. 1722):

> "In virtually all statutes of limitations the chronological length of the limitation period is inter-related with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." (Emphasis added.)

Barney v. Oerlrichs (1891) 138 U.S. 529, 530-1, 11 S.Ct. 414, 34 L.Ed. 1037 involved an

action to recover excess fees and charges paid by the plaintiff on imported merchandise. This Court applied New York's six year statute of limitations for actions against tax collectors; at the same time, the court also applied New York's law requiring the tolling of the statute of limitations during any period that the debtor is absent and resides out of the state.

Thus, if this Court determines that the most appropriate state statute of limitations applies to a Title VII claim by a private litigant, it must also borrow the laws of California regarding the tolling of statutes of limitations.

D. UNDER CALIFORNIA LAW, A STATUTE OF LIMITATIONS MUST BE TOLLED WHILE ADMINISTRATIVE REMEDIES ARE BEING PURSUED.

Under California law, a statute of limitations as to a civil suit is tolled during the pendency of any administrative proceeding which is a prerequisite to the filing of the action. Elkins v. Derby (1974) 12 Cal.3d 410, 115 Cal.Rptr. 641. In Elkins, a personal injury action was commenced beyond the one-year period of limitations set forth in §340(3) of the California Code of Civil Procedure. During the interim, the plaintiff had been exhausting his administrative remedies under the State Worker's Compensation laws. In reversing the trial court's ruling dismissing the action because

it was barred by the one-year statute of limitations, the California Supreme Court held that the action was tolled for the period during which the plaintiff pursued his Worker's Compensation remedy.

In reaching that conclusion, the court made the following pertinent observations (at 12 Cal.3d 414, 115 Cal.Rptr. 643-44):

> "It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding. . . . (Citations)
>
> "[A] line of relatively recent California cases . . . points toward the principle that regardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of another, if the defendant is not prejudiced thereby, the running of the limitations period is tolled '[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.'"

Campbell v. Graham-Armstrong (1973) 9 Cal.3d 482, 107 Cal.Rptr. 777 involved an action against a school district. The California Supreme Court indicated that the running of the statute of limitations was suspended when the

plaintiffs began to exhaust their adminstrative remedy by filing a claim with the governing board of the school district. (However, the court held that because the plaintiffs had failed to raise that theory in the trial court, they were barred from asserting the argument on appeal.)

In discussing the tolling issue, the court made the following statement (at 9 Cal.3d 490, 107 Cal.Rptr. 782):

> "The exhaustion of administrative remedies will suspend the statute of limitations even though no statute makes it a condition of the right to sue. (Citations) . . . When an injured person has several legal remedies, and, reasonably and in good faith, pursues one designed to lessen the extent of the injuries or damages, the statute of limitations does not run on the other while he is thus pursuing the one. (Citations)"

Respondent acted in good faith and reasonably in pursuing patiently and diligently his administrative remedies with the EEOC before bringing suit. During the pendency of the EEOC proceedings he initiated numerous written and telephonic contracts with the offices of the EEOC, the President of the United States, Senator Cranston, and his Congressman. At no time during those communications was he ever advised that he could institute a civil action during the pendency of the EEOC proceedings, or that California statutes of limitations might apply to

bar a subsequent civil action in the federal courts. In fact, it was not until August 5, 1976 that respondent first learned (from Senator Cranston, not the EEOC), that he could request the EEOC to issue a right to sue letter which would allow him to sue in federal court.

Respondent received his first written response to his charge from the EEOC on August 17, 1976. At that time, he was advised that his charge was being dismissed and that he had 90 days in which to commence a civil action in the United States District Court on the allegations contained in his charge. He then proceeded, for the first time, to obtain legal counsel so that such action could be initiated.

From this discussion it is apparent that if California law as to statutes of limitation is to be applied in this case, any applicable state statute of limitations must be tolled for the entire period that the matter was in the hands of the EEOC.

IV THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE ONLY OTHER CIRCUIT COURT OF APPEALS' DETERMINATION REGARDING THIS ISSUE.

Finally, it should be emphasized that the decision below of the Ninth Circuit Court of Appeals does not conflict with any decision of any other Circuit Court of Appeals. In fact, only one other

Circuit Court of Appeals has faced the issue presented herein: the Sixth Circuit in Draper v. United States Pipe & Foundry Co. (6th Cir. 1976) 527 F.2d 515, 522.

Draper acknowledged that, prior to the 1972 amendments, state statutes of limitations were employed for the limited purpose of ascertaining the maximum period for which an individual could recover back pay. The Court held that, following the 1972 amendments, state statutes of limitations were no longer relevant even for this limited purpose. The opinion took extreme pains to emphasize that at no time did the state law apply to determine the timeliness of the institution of a Title VII action by stating (at page 522):

> "Title VII provides specific time periods for the filing of a charge with the EEOC and for commencing a civil action after receipt of the right to sue letter (42 U.S.C. §2000e-5 (3)(f)). Title VII establishes its own statutes of limitations, and state law is irrelevant in determining whether a private individual has lost his right of action under Title VII through the passage of time. (Citations omitted) The record on the stipulations of the parties disclosed that Draper complied with the procedural requirements of Title VII and his suit is not time barred." (Emphasis added.)

As a result of the foregoing, there are no conflicting decisions of the various Circuit Courts

of Appeal that need be reconciled by this Court. To the contrary, the existing decisions of the Circuit Courts, and particularly the decision in this case, thoroughly discuss all of the pertinent issues and succinctly recite the applicable principles of law.

V. CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court deny the Petition for Certiorari and, thereby, support the decision of the Ninth Circuit Court of Appeals.

Dated: November 8, 1978.

Respectfully submitted,

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